DATO' ABDUL RAHMAN DATO' MOHAMMED HASHIM & ORS

v.

MASS MEDIA INTERACTIVE SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
ANANTHAM KASINATHER JC
[SUIT NO: D-22-NCC-694-2009]
21 MAY 2010

CIVIL PROCEDURE: *Pleadings - Facts not pleaded - Illegality - Issue of illegality of agreement not pleaded - Whether defendants precluded from raising issue of illegality*

CONTRACT: *Agreement - Variation of - Validity of variation agreement - Written concession agreement varied by a variation agreement removing requirement for government approval - Variation agreement intended to circumvent express prohibition in concession agreement and to mislead government - Whether variation agreement opposed to public policy and consequently illegal*

CONTRACT: *Collateral contract - Existence of - Oral agreement - Whether amounted to a collateral contract - Whether defendants privy to oral agreement*

CONTRACT: *Illegality - Opposed to public policy - Variation agreement intended to circumvent express prohibition in concession agreement and to mislead government - Whether variation agreement opposed to public policy and consequently illegal*

CONTRACT: *Oral agreement - Existence of - Whether amounted to a collateral contract - Whether defendants privy to oral agreement*

The Government of Malaysia granted a concession whereby the 3rd Defendant ('D3') was appointed the service provider for an 'Electronic Government'. One of the terms of the concession was that the shareholding structure of D3 was not to be altered in the first three years of the concession and thereafter only with the prior written approval of the Government. Amongst the major shareholders of D3 were the 1st defendant ('D1') and the 2nd defendant ('D2'). D1 was majority owned by Paxalent Corporation Berhad ('PCB') and the controlling shareholder of PCB, at that

A time, was I To Hearts. The management of PCB was in the hands of DW1 and the 1st plaintiff ('PW1'). The directors of D3 were DW2 and 3 other persons. DW2 was also at the material time a director of D1. According to PW1, DW1 and DW2 approached him sometime in July 2007 and requested for his assistance to
B help D3 solve its operational problems. At a meeting held to discuss the matter, DW1 and DW2 offered PW1 control of the management of D3. PW1 thus used his nominee company Speak Incentive Sdn Bhd) ('SPIN') to purchase the 30% stake in D1. The sale by I To Hearts of its 30% stake was contained in a
C Share Sale Agreement between SPIN and I To Hearts ('the SPIN agreement'). The completion was conditional upon SPIN obtaining the necessary regulatory approval for its purchase of the 30% stake within six months ('the approval condition'). The SPIN agreement was later varied by a Variation Agreement to remove
D the approval condition. The approval of the Government was no longer a condition precedent but a condition subsequent, with no time limit imposed for obtaining such approval. Notwithstanding the removal of the approval condition, D1 terminated the SPIN agreement alleging failure on the part of SPIN to obtain regulatory
E approval within six months. D1 and D2 also sought to remove the plaintiff as directors. PW1 claimed that the plaintiffs' appointment as directors of D3 was in accordance with an oral agreement reached by PW1 with DW1 and DW2 during their discussions, prior execution of the SPIN agreement. The defendants
F contended that the appointment of the plaintiffs as directors and their assuming control of D3 was to facilitate the resolution of some pressing issues confronting D3 but always conditional on the purchase by the plaintiffs of D1's controlling interest in D3. They contended that any assurance given by DW1 and DW2
G concerning the duration of their positions as directors of D3 was not binding on D1 since D1 is not a party to either the oral agreement or the SPIN agreement. The following issues arose for determination: (i) what were the terms of the 'oral agreement' amounting to a collateral contract, if any, reached between PW1
H and DW1?; and (ii) were the defendants privy to the oral agreement?; (iii) the validity of the Variation Agreement; (iv) effect of illegality of the Variation Agreement; and (v) the relief to be granted.

I

Held (dismissing the plaintiffs' claim with costs):

(1) PW1 and DW1 did reach an oral agreement amounting to a collateral contract, in the following terms: The defendants to appoint the plaintiffs as directors of D3 and allow them control of the board of directors of D3, pending completion of the share sale agreement. The plaintiffs, in turn, were to purchase an initial stake of 30% from I To Hearts and thereafter the substantial shareholdings in D3 of D1, subject to PCB retaining a 20% stake of D3. The relinquishing of the management control of D3 to the plaintiffs to be conditional on the plaintiffs becoming the controlling shareholder of D3, after obtaining Government approval. The defendants were privy to the oral agreement and consequently parties to the collateral contract. (paras 8 & 11)

(2) The Variation Agreement was clearly intended by the plaintiffs to circumvent the express prohibition contained in the concession agreement. The plaintiffs clearly intended to mislead the Government into believing that there was no change in the shareholding structure of D3, when to all intents and purposes, SPIN had become the beneficial owner of D2's 30% stake in D3. This contravention of the concession agreement rendered the Variation Agreement illegal, as being opposed to public policy and consequently void. The defendants were not precluded from raising the issue of illegality, notwithstanding, the same not having been pleaded. (para 12)

(3) Since the Variation Agreement was illegal, the SPIN agreement survived to be the agreement to determine the legal rights of the parties. Thus, I To Heart's termination of the SPIN agreement was valid since SPIN had not obtained the approval of the Government within six months. The collateral contract did not assist the plaintiffs remaining as directors of D3 indefinitely since under the collateral contract, their appointment as directors was pending the completion of the share sale agreement. Such completion was no longer possible due to the termination of the SPIN agreement. Hence, the relief sought by the plaintiffs ought to be dismissed. (paras 17 & 18)

Obiter:

(1) Even if the court had not held the Variation Agreement to be illegal, the court would not have granted the declaratory relief sought by the plaintiffs. This is so because the granting of declaratory relief is discretionary in nature and the court would not have exercised its discretion in favour of granting the declaratory relief sought since this prayer was designed to secure the appointment of the plaintiffs as directors for an indefinite period of time. The terms of the collateral contract precluded the court from permitting the indefinite appointment of the plaintiffs save upon the completion of the SPIN agreement and the plaintiffs becoming the controlling shareholders of D3. (para 19)

Case(s) referred to:
Mustafa Osman v. Lee Chua (P) [1996] 3 CLJ 494 CA ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 128(2), 153

For the plaintiffs - Romesh Abraham (Jason Gopal with him); M/s Shook Lin & Bok
For the defendants - Dato' Harpal (Renu Zechariah & Ragumaran with him); M/s AJ Ariffin Yeo & Harpal

Reported by Amutha Suppayah

JUDGMENT

Anantham Kasinather JC:

Background Facts

[1] The facts of this case are, that by an agreement dated 23 May 2000 (exh. 59-209 PBD1), the Government of Malaysia granted a concession whereby the 3rd defendant ('D3') was appointed the service provider for an 'Electronic Government' One of the terms of the concession is that the shareholding structure of D3 was not to be altered in the first three years of the concession and thereafter only with the prior written approval of the Government. The shareholders of D3 at the time of the concession were the 1st defendant (MMI) ('D1') (60%); the 2nd

defendant ('D2') (30%) and Dibena Enterprise Sdn. Bhd. (10%). D1 was majority owned by Paxalent Corporation Berhad ('PCB') and the controlling shareholder of PCB, at that time, was I To Hearts (exh. 282 of PBD2). The management of PCB was in the hands of Ong Soon Kiat ('DW1'), as its Chief Executive Officer and the 1st plaintiff as Chairman of the Board of Directors. The directors of D3, at this juncture were En. Muhammed Radzif bin Ahmad Rasiddi ('DW2'); Anwardi Jamil; Azhar bin Abu Bakar; Winnie Looi Swee Yoong and Aila Melissa Abdullah. DW2 was also at the material time, the chief executive officer and director of D1 and director of D3.

[2] In end 2007, D3 encountered various operational problems arising from poor management and corruption within the organisation exposing D3 to the risk of losing the concession. According to the 1st plaintiff ('PW1'), DW1 and DW2 approached him sometime in July 2007 and requested for his assistance to help D3 solve its problems. Pursuant thereto, PW1 and DW1 met on two different occasions in Kuala Lumpur and in Singapore to discuss all available options to resolve the difficulties confronting D3 in the performance of the concession agreement. It was at one of these meetings that DW1 and DW2 offered PW1 control of the management of D3. According to PW1, the real reason for this offer to transfer control of the management of DW3 to him in August 2007, was to show the authorities that genuine efforts were being made to address these problems (see Answer (A) to Question (Q) 17 of WSPW1). DW1 and DW2 also offered to sell him a 30% stake in D3 and to appoint him a director after the execution of a sale and purchase agreement (see A to Q 18 WSPW1). The immediate purpose of PW1 being appointed director was to enable him to assume management control of the 3rd defendant and thereby confer authority upon him to solve the managerial and operational problems of the 3rd defendant (see A to Q 18 WSPW1). The ultimate objective, according to PW1, was for him to nominate persons to the board of directors of D3 and invite new parties to become strategic shareholders. D1's representatives on the board, in turn, were to step down as a prelude to the plaintiffs assuming full management control of D3 through acquiring D1's stake in D3. Again, according to PW1, since this offer made commercial sense to him and included the prospect of him acquiring equity position in a potentially profitable D3, he accepted the offer (see

A to Q 22 WSPW1). The acceptance of the offer led to the issuance by DW1 of two letters of undertaking. By the first letter of undertaking dated 22 August 2007, DW1 agreed to cause I To Hearts to sell 30% of the equity of D3 at the price of RM2.5 million (exh. 248 PBD2). By another letter of undertaking of the same date, DW1 also undertook to cause D1 to sell its substantial shareholdings in D3 subject to agreement being reached between the parties, with both undertakings being conditional on regulatory approvals. By substantial shareholdings, DW1 meant that PCB was prepared to sell all but 20% of its equity in D3 to the plaintiffs over time (exh. 283 of PBD2).

[3] The sale by I To Hearts of its 30% stake is contained in a Share Sale Agreement dated 13 September 2007 between SPIN and I To Hearts (the SPIN agreement – exh. 256-272 of PBD 2). PW1 used his nominee company Speak Incentive Sdn. Bhd.) ('SPIN') to purchase the 30% stake in D1. SPIN, according to him, was intended by him to be the new investor in D3 (see A to Q 23 WSPW1). The purchase consideration for the 30% stake stipulated in the SPIN agreement was RM2.5 million, payable on the completion date. The completion was conditional upon SPIN obtaining the necessary regulatory approval within six months. (see cl. 3.3 of the SPIN Agreement). PW1 was duly appointed a director of D3 on 1 October 2007 together with the 2nd and 3rd plaintiffs and the 4th plaintiff appointed on 27 June 2008 (exh. 392 CC PBD2). Four of the then directors of D3 resigned their position as directors in October 2007 and DW2 was removed as a director on 10 June 2008 (exh. 355 of PBD2). In other words, the plaintiffs assumed control of the management of D3 by October 2007 and full control by June 2008, upon the removal of DW2. The resignation of the then directors and the removal of DW2 did not elicit any serious objection from DW1 or D1. On the contrary, their involvement was acclaimed by DW1 in a fax message dated 29 October 2007 (exh. 294 A and 295 of PBD2). Attempt by D1 to appoint the new directors were not favourably received by the plaintiff (A to Q 59 of WSDW2).

[4] The SPIN agreement was varied by a Variation Agreement dated 18 February 2008 ('Variation Agreement' – exh. 313-320 of PBD2). The Variation Agreement served to remove the condition precedent in the agreement requiring SPIN to obtain regulatory approval for its purchase of the 30% stake within a period of six

months. The approval of the Government was no longer a condition precedent but a condition subsequent, with no time limit imposed for obtaining such approval. The purchase consideration for the 30% stake was altered from RM2.5 million to an amount to be a determined by a valuer, to be jointly appointed by the parties. Additionally, I To Hearts transferred the shares to SPIN upon the execution of the Variation Agreement, on the understanding that if the necessary approvals were not obtained, the shares were to be re-transferred to I To Hearts with I To Hearts to hold the shares in trust for an on behalf of SPIN in the interim.

[5] Notwithstanding, the removal of the period to obtain the necessary regulatory approval, D1 terminated the SPIN agreement alleging failure on the part of SPIN to obtain regulatory approval within six months (exh. 321 of PBD2). D1 and D2 thereafter sought to convene a meeting to remove the plaintiff as directors by way of special notice issued pursuant to s. 128(2) and 153 of the Companies Act (exh. 663-664 of PBD3). The plaintiffs successfully obtained an order in the High Court preventing D3 from proceeding with the meeting. The Court of Appeal, however, overturned the decision of the High Court. As the date for the meeting had already lapsed by the time the Court of Appeal made its decision, D1 gave notice to the plaintiff of another meeting to remove them as directors but which meeting was by consent postponed pending the outcome of this trial.

Plaintiff's Case

[6] PW1's evidence is that the plaintiffs' appointment as directors of D3 and their assuming full management control of D3 was, in accordance, with an oral agreement reached by PW1 with DW1 and DW2 during their discussions, prior execution of the SPIN agreement (see p. 11 of NE of 11 March 2010). This oral agreement, according to PW 1 was not incorporated in the SPIN agreement because the SPIN agreement was prepared by Hearts solicitors (see p. 11 of NE of 11 March 2010). By reason thereof, some of the oral representations by DW1 were not incorporated in the SPIN agreement (see p. 13 of NE of 11 March 2010). The proof of these representations forming part of the SPIN agreement, according to PW1, is the absence of any objection when it was implemented in the form of the plaintiffs being

A appointed directors, to the exclusion of the representatives of D1. After the plaintiffs had turned D3 into a well run profitable company, I To Hearts terminated the SPIN agreement and, according to PW 1 unlawfully sought to remove the plaintiff as directors. Unlawful because the termination was in breach of the
B terms of the Variation Agreement. (see A to Q30 - 30 WSPW1). The thrust of the plaintiff's claim is that pursuant to the oral agreement, the plaintiffs are entitled to continue to be in control of the management of D3 so long as the SPIN agreement is subsisting and the regulatory approval still pending (see paras 4.6
C and 4.7 of the written submission of counsel for the plaintiff). By reason thereof, the principal prayers sought by the plaintiffs in the statement of claim are for declarations that any notice to remove them as directors is unlawful, they cannot be removed as directors of D3 and an order that the defendant cannot appoint any of
D their representatives as directors.

Defendant's Case

[7] It is the defendant's case that the appointment of the
E plaintiff as directors was pursuant to the terms of the SPIN agreement, specifically cl. 8.1 of the agreement. The defendants contend that the appointment of the plaintiffs as directors and their assuming control of D3 was to facilitate the resolution of some pressing issues confronting D3 but always conditional on the
F purchase by the plaintiffs of D1's controlling interest in D3 (see p. 90 of NE of 13 March 2010). The defendants deny that the appointment of the plaintiffs as directors precludes D1 as a majority shareholder of D3 from removing them as directors of D3. They contend that any assurance given by DW1 and DW2 concerning the duration of their positions as directors of D3 is not
G binding on D1 since D1 is not a party to either the oral agreement or the SPIN agreement. Furthermore, they rely on the Entire Agreement clause (cl. 13 of the SPIN Agreement) which, according to them, precludes either party to the agreement from relying on any oral agreement. In any event, since the purchase
H by the plaintiffs of D1's substantial shareholdings is conditional on the approval of its shareholders, principally PCB and since no firm agreement has been reached between either PCB or D1 with the plaintiffs to sell their substantial shareholdings to the plaintiffs, the plaintiffs are not entitled to any of the relief sought by them in
I their claim.

After a careful examination of the plaintiff's pleaded case, the evidence led by both parties and the respective written submissions of both counsel, in my judgment the following are the issues for determination:

First Issue

i) What Are The Terms Of The 'Oral Agreement' Amounting To A Collateral Contract, If Any, Reached Between PW1and DW1?

[8] I accept the evidence of PW1 that he and DW1 did reach an oral agreement amounting to a collateral contract. In my judgment, the terms of the collateral contract are as follows;

The defendants to appoint the plaintiffs as directors of D3 and allow them control of the board of directors of D3, pending completion of the share sale agreement. The plaintiffs, in turn, were to purchase an initial stake of 30% from I To Hearts and thereafter the substantial shareholdings in D3 of D1, subject to PCB retaining a 20% stake of D3. The relinquishing of the management control of D3 to the plaintiffs to be conditional on the plaintiffs becoming the controlling shareholder of D3, after obtaining Government approval.

My findings are based on exhs. 255, 273, 275, 276 and 282-286 of PBD2 and the oral evidence of the witnesses. Relevant to the first issue is the evidence of PW1 recorded at pp. 11-14 of NE of 11 March 2010. The following questions and answers are recorded in the notes of proceedings.

Dato Harpal : Let us take the oral representations that you spoke of. These oral representations preceded the SPIN agreement?

PW1 : Yes, it was made clear.

Dato Harpal : So you did liaise with Hearts' solicitors) Or solicitor appointed by Hearts?

PW 1 : They did communicate with me and the other directors of SPIN.

Dato Harpal : Did you have the benefit of draft being exchanged, correspondence from the solicitors before the execution?

PW 1 : Yes.

Dato Harpal : And exactly, what was excluded from the written agreement?

PW 1 : The agreement that was reached between Mr. SK Ong and myself was that he was to sell his entire shareholding to overcome whatever problems confronted the company. At end of the day, he wants to sell his entire 90% shares.

Dato Harpal : So what was excluded of the oral arrangement?

PW 1 : I think the time frame.

Dato Harpal : Did you protest about exclusion?

PW 1 : No. I did not make any protest because my reliance and representations made by Mr. S.K Ong is based on our personal relationship.

[9] It is my finding that the words 'to be agreed' in cl. 8(a) of the SPIN agreement refers to the oral agreement reached between PW1 and DW1 during their negotiations in Kuala Lumpur and Singapore as set out in exhs. 248, 249, 252, 253, 255 and 273 and thereafter confirmed by the defendants with the changes recorded in exhs. 274, 275, 276 and 282-286. This is because at the time of the execution of the SPIN agreement by SPIN on 5 September 2007 (executed copies of the SPIN agreement were forwarded together with this letter), the parties were still negotiating on the number of the plaintiffs' representatives to sit on the board of D3, the degree of management control the plaintiffs were to exercise and the duration of their appointment. The negotiations on these matters involving the Defendants continued till 18 September 2007 (exhs. 275-276 of PBD2) a date after the execution of the SPIN agreement by both parties. The number of SPIN's representative on the board of D3 was already agreed at 3, at the time of the execution of the SPIN agreement (97 NE of 30 March 2010). As regards control, it is evident from exh. 255 of PBD2 that PW1 had agreed to transfer control of the management of D3 to the plaintiffs. However, presumably after discussing the matter with the directors of PCB and D1, DW1 entertained doubts thereafter as to the implications of such

transfer of control on the concession agreement. Hence, the letter of 11 September 2007 seeking to withdraw from the original position (exh. 255 of PBD2). It is this change that prompted the court to observe during the trial that DW1 must have agreed earlier to the transfer of management control to the plaintiffs. As regards the tenure of the plaintiff's appointment, my finding is that the tenure was to be 'pending completion of the share sale agreement'. This is because the words 'pending completion of the share sale agreement' are preceded by the words 'as agreed' in SPIN's letter of 5 September 2007 and the defendants' have not disputed this to be the case. It is also my finding that since the oral agreement was between PW1 and DW1 in their personal capacity (as noted earlier) cl. 8(a) envisaged DW1 securing the consent of the defendants to the oral agreement.

[10] As regards cl. 8(b) of the SPIN agreement, the understanding at the time of the despatch of 5 September 2007 letter was that the plaintiffs were to be allowed to purchase 90% of the shares of D3 (exh. 249 of PBD2). As no time frame had been agreed between the parties for the completion of this purchase (see evidence of PW1 recorded earlier in this judgment), the parties agreed to enter into a shareholder agreement dealing with the purchase of D1's substantial shareholdings, 14 days after the completion of the SPIN agreement. A careful examination of cl. 8(b) will reveal that the parties by this clause were effectively only implementing that part of the oral agreement as set out in the second letter of undertaking of 22 August 2007 (exh. 249 of PBD2). The first limb of cl. 8(b), in turn, is consistent with the second paragraph of exh. 249 of PBD2. It is my finding that when the consent of PCB and D1 was sought to the oral agreement, after the execution of the SPIN agreement, PCB expressed the intention to retain 20% of D3 and refused to relinquish control of the management of D3 until SPIN became the controlling shareholder of D3 with the relevant Government approval (exh. 283 of PBD2). The oral agreement incorporating the changes introduced by the defendants representing the collateral contract.

Counsel for the defendant submitted at length on the Entire Agreement clause in the SPIN agreement. Counsel relying on numerous authorities contended that the effect of clauses similar to cl. 13 of the SPIN agreement have been held by the courts to

exclude both parties from relying on any oral agreement, such as the oral agreement relied upon by the plaintiff. With respect, I do not see the relevance of cl. 13 in the context of the facts of this case. In my opinion, the SPIN agreement is conclusive as between the parties on all matters concerning the terms and conditions governing the sale and purchase of the 30% stake only. However, on matters relating to the management of D3, cl. 8(a) provided for the parties to reach agreement as regards the plaintiffs' appointment to the board of D3; their tenure on the board, as well, as, the degree of control over the management of D3. Similarly, cl. 8(b) was in relation to the subject of the purchase by SPIN of the remaining shares of D1 and reflects the second undertaking letter of 22 August 2007. In any event, I find the submission of counsel for the defendants to be highly contradictory on this issue. In one breath, counsel contends that the plaintiffs cannot rely on the collateral contract since they are not parties to the SPIN agreement, yet, in the next breath, counsel contends that the plaintiffs cannot rely on the collateral contract because of the entire agreement clause. The plaintiffs cannot conceivably be bound by the entire agreement clause unless privy to the SPIN agreement. Accordingly, in my judgment, cl. 8(a) and (b) of the SPIN agreement is valid and not ousted by the entire agreement clause. Of course, if no agreement is reached pursuant to cl. 8(a) or (b), then, the particular clause upon which no agreement was reached ceases to be enforceable by reason of cl. 13.8 of the SPIN agreement. Since the parties did not proceed to negotiate further on the purchase of the remaining shares of D1, this would appear to be the fate of cl. 8(b).

Second Issue

ii) Are The Defendants Privy To The Oral Agreement?

[11] In my judgment, the defendants are privy to the oral agreement and consequently parties to the collateral contract. My finding is based on the following evidence;

a) At the material time, D1 was the controlling shareholder of D3 and PCB, in turn, was the controlling shareholder of D1. Through its purchase of D2's 30% stake of D3, I To Hearts was also the beneficial owner of this 30% stake. At the

material time, DW1 was the Chief Executive Officer of the PCB whilst DW2 was the Chief Executive Officer of D1 and the Director of D1 and D3. DW1 was also the Chief Executive Officer of the Group which included D1, D3 and I To Hearts;

b) Shortly after the conclusion of the discussions, DW1 provided two letters of undertaking to PW1 confirming by the first letter, his agreement to cause I To Hearts to enter into a share sale agreement for the sale of the initial 30% of D3's equity beneficially owned by I To Hearts to PW1's nominee company. By the second letter, DW1 agreed to cause D1 to sell its 'substantial shareholdings' in D3 subject to terms and conditions to be agreed between D1 and PW1 (exh. 248 and 249 of PBD2);

c) Shortly after the letters of undertaking, DW1 caused the solicitors for I To Hearts to forward the draft sale and purchase agreement containing the terms and conditions for the purchase by PW1 through SPIN of the initial 30% of D3. This agreement apart from providing the terms and conditions for the sale and purchase of the shares, also incorporated a clause under the caption of 'management of the company'. This clause contemplated agreement being reached between D1, D3 and PW 1 concerning the granting of representation to PW1 on the board of directors, as well, as, in the management of D3.

d) There is ample evidence that the business of D3 was in disarray and DW1 on behalf of PCB, D1 and D3 genuinely believed that the plaintiffs were the best persons to resolve the problems confronting D3 and thereby eliminate the risk of D3 losing the concession (see the evidence of DW1 at pp. 75 and 79 of the notes of evidence (N.E) of 30 March 2010). The contents of DW1's fax of 29 October 2007 says it all (exh. 295 of PBD2);

e) In recognition of the fact that the oral agreement was concluded by DW1, cl. 8(a) of the SPIN agreement required SPIN to obtain the agreement of the defendants to the SPIN agreement;

A f) The plaintiffs were thereafter appointed as directors of D3 and the defendant's representatives, apart from DW2, who was removed, resigned without eliciting any objection from the defendants and

B g) The terms of the oral agreement were altered when the agreement of the defendants and PCB was sought to its terms. This is evident *inter alia* from the contents of exhs. 255 of PBD2 and 283 of PBD2. PCB and the defendants were only agreeable to two of the plaintiffs being appointed C directors initially and, more importantly, they were opposed to the plaintiffs securing total management control of D3 before the plaintiffs became the controlling shareholders of D3. The defendants and PCB also insisted on the completion of the share sale agreement before any sale and purchase agreement D is signed for the remaining equity of D3. The share sale agreement to be completed only after SPIN had obtained the prior written approval of the Government. These changes to the oral agreement together with the oral agreement concluded between PW1 and DW1 represents the collateral contract E between the plaintiffs and the defendants. The plaintiffs accepted the collateral contract and, then offered to undertake the resolution of the problems confronting D3 'in good faith' (exh. 276 of PBD2).

F **[12]** In my judgment, the aforesaid facts clearly afford ample evidence of the defendants being privy to the SPIN agreement and being parties to the collateral contract, pursuant to cls. 8(a) and (b) of the SPIN agreement. It is my finding based on the evidence set out above, that the plaintiffs, PCB and the G defendants were happy to go along with the collateral contract once the plaintiffs agreed to allow PCB to retain 20% of D3 and the control of the management of D3 being conditional initially on the completion of the share sale agreement within six months and thereafter on the plaintiffs' acquiring the controlling stake of D3 H from D1. In my judgment, any other finding would be incongruous with the happenings after the execution of the SPIN agreement. These included the plaintiffs being appointed directors of D3 almost immediately after the execution of the SPIN agreement; the defendant's representatives on the board of directors of D3 I resigning just as quickly and the plaintiffs controlling the management of D3, almost exclusively even before DW2 was

removed in June 2008. It is my finding that the swift implementation of the collateral contract in the form of the plaintiff's appointment and the resignation of D1's representatives would not have been possible but for the Defendants being privy to the collateral contract. It is inconceivable that DW1 as the Group CEO would have allowed all of this to happen without the sanction of the defendants. That the defendants were privy to the collateral contract is also borne out by the contents of DW1's fax on the Letterhead of PCB recording his appreciation for the efforts of PW1 and recognizing him as the strategic partner of D3. The fact that DW2 in his capacity as the Chief Executive Officer and director of D1 almost immediately caused a fax along similar lines to be forwarded to the directors of the D1 and D3 only serves to reveal the strong hold exerted by DW1 over all the companies in the group including D1 and D3 in his capacity as the Group CEO (exh. 295 of PBD2 and the Cross-Examination of DW2 on this issue at 56 and 56 NE of 18 March 2010).

Third Issue

The Validity Of The Variation Agreement

[13] The Variation Agreement is vital to the plaintiffs' claim since it is pursuant to this agreement that it can defeat the defendants claim to have validly terminated the SPIN agreement. The plaintiffs contend that cl. 1.4 of the Variation Agreement effectively removed the requirement under the SPIN agreement that it obtain Government approval for its purchase of I To Hearts 30% stake within six months. In effect, according to the plaintiffs, by reason of this clause, there was no time limit for the plaintiffs to obtain Government approval. Since the termination of the SPIN agreement was entirely premised on the SPIN agreement and in total disregard of cl. 1.4 of the Variation Agreement, counsel for the plaintiffs contended that the termination of the SPIN agreement was unlawful; the SPIN agreement still subsisting and consequently the attempted removal of the plaintiff by the proposed resolutions in the notice of meeting of the company of 5 March 2010 unlawful.

[14] Counsel for the defendants submitted that the Variation Agreement is illegal. The illegality consisting of the plaintiffs actively giving the Government the impression that the original shareholders were still in control of the board of D3, when the

truth was to the contrary. Counsel for the defendants relies on the letter from the Government dated 4 January 2008 (exh. 307(a) and 307(b) of PBD2) in support of this submission. Notwithstanding, the contents of the letter of 4 January 2008, I reject the submission of illegality on this ground because, in my opinion, what is prohibited by cl. 19.3 of the concession agreement is not the control of the management of D3 by persons other than the shareholders of D3 but changes in the shareholders and/or the shareholding structure of D3. Accordingly, notwithstanding, the contents of the Government's letter of 4 January 2008, I do not find any merit in this submission.

[15] In my judgment, cl. 1.4 whilst helpful to the plaintiffs in the sense contended for by its counsel, is unfortunately fatal in another material respect. That is this. It is clear, beyond doubt, that cl. 19.3 prohibits any transfer of shareholdings and any changes in the shareholding structure of D3, save with the prior written approval of the Government. PW1 citing the need for him to become the beneficial owner of I To Hearts 30% stake, purportedly to increase his clout when negotiating with the Government, persuaded DW1 to enter into the Variation Agreement. Irrespective of the reasons behind the execution of the Variation Agreement, the fact of the matter is that cls. 1.4 and 1.1 of the Variation Agreement, effectively converted the condition precedent requiring Government approval for the transfer of the 30% stake to the plaintiffs, into a condition subsequent in the Variation Agreement. Accordingly, SPIN became the beneficial owner of the 30% stake even before the prior written approval of the Government could be obtained pursuant to cl. 19.3 of the concession agreement. That cls. 1.1 and 1.4 of the Variation Agreement were intended to have this effect, is evident from the release of the shareholder certificates and the provision in cl. 1.4(b), that pending the prior written approval of the Government, the shares were to be held 'in trust for and on behalf of the purchaser'. That the plaintiffs' claim is premised on the basis of the plaintiffs being the beneficial owner of the 30% stake is evident from para. 10 of the statement of claim which reads as follows:

> The First Plaintiff is, and was, at all material times, the controlling shareholder and director of KOMMS Technology Sdn. Bhd. formally known as Speed Insentif Sdn. Bhd (SPIN).

[16] In my judgment, the Variation Agreement was clearly intended by the plaintiffs to circumvent the express prohibition contained in cl. 19.3 of the concession agreement. The plaintiffs clearly intended to mislead the Government into believing that there was no change in the shareholders and the shareholding structure of the 3rd defendant, when to all intents and purposes, SPIN had become the beneficial owner of D2's 30% stake in D3. In my opinion, this contravention of the concession agreement renders the Variation Agreement illegal, as being opposed to public policy and consequently void. I accept the submission of counsel for the defendants that the defendants are not precluded from raising the issue of illegality, notwithstanding, the same not having been pleaded (see *Mustafa Osman v. Lee Chua (P)* [1996] 3 CLJ 494).

Fourth Issue

Effect Of Illegality Of Variation Agreement

[17] The effect of the court holding the Variation Agreement to be illegal is that the SPIN agreement survives to be the agreement to determine the legal rights of the parties (see cl. 4 of Variation Agreement). Since the SPIN agreement required SPIN to obtain the written approval of the Government within six months of the SPIN agreement, it follows that I To Hearts termination of the SPIN agreement by its letter of 10 April 2008 is valid, in law. It not being in dispute that SPIN has not obtained the approval of the Government even till today. The terms of the collateral contract do not assist the plaintiffs remaining as directors of D3 indefinitely since under the terms of the collateral contract, their appointment as directors was pending the completion of the share sale agreement. The lawful termination of the SPIN agreement rendering such completion to be no longer possible.

Fifth Issue

Relief

[18] Since it is my finding that the termination of the SPIN agreement is lawful and the plaintiffs exclusive control of the management of D3 conditional on their becoming the controlling shareholders of D3, both of which are no longer possible, it must follow that all the relief sought by the plaintiffs ought to be dismissed by this court and so I order.

[19] Before I conclude this judgment, I would like to observe that even if I had not held the Variation Agreement to be illegal, I would not have granted the declaratory relief sought by the Plaintiffs. This is so because the granting of declaratory relief is discretionary in nature and I would not have exercised my discretion in favour of granting the declaratory relief sought in prayer (b) of para. 18 since this prayer is designed to secure the appointment of the plaintiffs as directors for an indefinite period of time. The terms of the collateral contract as determined by this court precludes this court from permitting the indefinite appointment of the plaintiffs save upon the completion of the SPIN agreement and the plaintiffs becoming the controlling shareholders of D3. The plaintiffs becoming the controlling shareholders of D3 is fraught with the following obstacles;

a) No negotiations have taken place since the execution of the SPIN agreement to reach agreement on the terms for the purchase by the plaintiffs of D1's substantial shareholdings;

b) Unlike the position at the time of the termination of the SPIN agreement on 10 April 2008, the reality is that after almost three years of the execution of the SPIN agreement, the plaintiffs have still not been able to obtain the written approval of the Government to their acquisition of the 30% stake. In this respect, it must be borne in mind that because the plaintiffs rejected the repudiation of the SPIN agreement, in law, they were entitled to treat the SPIN agreement as subsisting and continue to seek the approval of the Government. Indeed, this is exactly what they have been doing. Evidence was led of their continuing efforts to obtain such approval but the fate of their application remains uncertain even till today and

c) Even if such approval from the Government was forthcoming, the SPIN agreement was to become unconditional only if the Government's approval was obtained 'upon terms and conditions which are accepted or deem accepted by the parties in accordance with the provisions of this agreement' (see cl. 3.4 of the SPIN agreement). In other words, the approval, when granted, may not be on terms acceptable to the parties to the SPIN agreement.

[20] As regards prayer (d) of para. 18 of the statement of claim, this prayer is premised on the plaintiffs being appointed of directors of D3 to the total exclusion of the defendant's representatives. Even if the Variation Agreement is valid, there is no evidence that the Defendants agreed pursuant to the collateral contract to not appoint their representatives to the board of D3. On the contrary, under the terms of the collateral contract, the Defendants only agreed to relinquish control upon the plaintiffs becoming the controlling shareholders of D3. For the reasons stated earlier, this is no longer possible.

[21] It was urged upon me by counsel for the plaintiffs that I should, at the least, restrain the defendants from proceeding with the meeting to be convened pursuant to the notice of 5 March 2010 since such a restraining order will allow the *status quo* to be maintained pending the Government responding to the plaintiffs' application for approval of the transfer of the 30% stake. I refuse to exercise my discretion in favour of granting this restraining order simply because the application for approval has been pending for far too long and there is no assurance that the approval when granted will be on terms acceptable to all parties. Accordingly, in my judgment, it is not in the interests of justice for me to exercise my discretion in favour of the plaintiffs.

[22] I dismiss the plaintiffs' claim with costs. I order the plaintiffs to pay lump sum costs of RM75,000 to the defendants *in lieu* of taxation. I discharge the order made by me on 11 March 2010 precluding the 1st defendant from proceeding with the meeting convened pursuant to the notice of 5 March 2010 and/or precluding the defendants from implementing resolutions passed pursuant to this notice at the meeting of the 3rd defendant held on 10 March 2010.